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9 On behalf of the Defendant Joshua Gregory Allen.

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12 On behalf of the Defendant Omar Safar Halabi.

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1 P R O C E E D I N G S

2 THE CLERK: This is Civil Action 09-10394, United Air  
3 Lines vs. Allen, et al. Will counsel please identify  
4 themselves for the record.

5 MS. DURHAM: Good morning, your Honor. Gina Durham on  
6 behalf of United.

7 THE COURT: Miss Durham, good afternoon.

8 MR. IVERSON: Matt Iverson, also on behalf of United.

9 THE COURT: Mr. Iverson.

02:46 10 MR. HEYMAN: Todd Heyman, Omar Halabi.

11 THE COURT: Mr. Heyman.

12 MR. LICHTBLAU: Joseph B. Lichtblau on behalf of  
13 Joshua Allen.

14 THE COURT: Mr. Lichtblau. Don't worry about the  
15 microphones, counsel. I can hear you fine without using them.

16 We're here because there are several pending motions  
17 in this case, and they have been pending for some time. We had  
18 a hearing -- when was it? Last month, I believe. And we had  
19 an issue as to whether or not the claims of United Air Lines  
02:46 20 should be dismissed for -- on preemption grounds and so forth.  
21 And I have made certain determinations that I want to convey to  
22 counsel now and, hopefully, get this case back on track.

23 I'll just say in beginning that the Court does believe  
24 that the defendants have made an effort to game the system.  
25 Whether that gaming is legal or illegal, that decision is for

1 another day. But the Court believes that causes of action can  
2 be stated against the defendants but have not necessarily been  
3 stated at this point.

4 Earlier during the case, the Court instructed the  
5 plaintiff to file an amended complaint with general allegations  
6 of the scheme, and only the details of the alleged illegal  
7 scheme, in a sealed addendum. The plaintiff, however, instead,  
8 filed separate complaints, an open one with redactions. That  
9 is completely unacceptable and inappropriate. And so we're  
02:48 10 going to have to start over again if the plaintiff so chooses.

11 The amended complaint, which is in four counts, will,  
12 therefore, be dismissed without prejudice to the filing of a  
13 second amended complaint within 30 days. And with this  
14 dismissal, the Court wishes to make the following points clear:  
15 First, the complaint is not dismissed on preemption grounds.  
16 This Court is satisfied that the plaintiff here is not  
17 attempting to avoid the regulatory purpose of the Aviation  
18 Deregulation Act but is, rather, trying to protect the vitality  
19 of its self-imposed obligations under its voucher program.

02:49 20 And I rely in that decision on the reasoning of the  
21 Frequent Flier Depot case from the Texas appellate court this  
22 year; and, also, the reasoning of Continental Airlines, the  
23 Central District of California case several years ago, that the  
24 plaintiff's claims will not have a significant effect on that  
25 airlines' rates, routes or services.

1           Now, the plaintiff's fraud and intentional  
2       misrepresentation count is dismissed without prejudice because  
3       the alleged fraud is not stated with sufficient specificity.  
4       One customer buying multiple full-fare tickets, fully intending  
5       not to use one or more of those tickets, is not actionable  
6       fraud. The systematic purchase of full-fare tickets by  
7       coordinating individuals using disguises and different names  
8       may be actionable, but the scheme must be described in more  
9       detail. Also, the plaintiffs have alleged no reliance on the  
02:50 10      defendants' misrepresentations, and what defendants  
11      specifically misrepresented to United Air Lines is still  
12      unclear.

13           Third, the plaintiff's intentional interference with  
14      advantageous business relations is dismissed without prejudice  
15      because, although this is a close call as to whether or not a  
16      claim was stated by the airlines originally, the plaintiff does  
17      need to be more specific about the particular business  
18      relationship with which the defendants allegedly interfered and  
19      the specific damages the plaintiff allegedly suffered as a  
02:51 20      result.

21           Fourth, the plaintiff's civil conspiracy claim is  
22      denied without prejudice because the same detail that is  
23      lacking in the fraud and intentional interference counts  
24      detracts from the adequacy of that count.

25           And, fifth, the plaintiff's Lanham Act count is

1 dismissed without prejudice because there is no allegation that  
2 there was some actual use of its trademark under circumstances  
3 that, if true, would likely lead to consumer confusion.  
4 Plaintiff's alleged facts are simply too sparse.

5 Now, with respect to the pending motions to seal and  
6 any future sealing, only the specific details of the alleged  
7 scheme, that is, for example, the methods used by the  
8 defendants at the airport when giving up seats and obtaining  
9 vouchers, alleged disguises that they used or the changing of  
02:52 10 the names, the eBay advertisements, the use of the United Air  
11 Lines logo, instructions to voucher purchasers as to how to  
12 fool United Air Lines, et cetera, that sort of information may  
13 be sealed but not the fact that full-fare tickets are redeemed  
14 or that the defendants didn't imply that they never intended to  
15 fly on United Air Lines. That is not actionable fraud.

16 Now, the allowed sealing is not for this stage of the  
17 litigation -- rather, is for this stage of the litigation only  
18 and will not necessarily apply from henceforth when we get to  
19 the summary judgment and/or trial stage because, at least for  
02:53 20 now, the Court has determined the litigants' substantive rights  
21 are not at stake.

22 There will be no more replies or sur-replies to  
23 pleadings filed in this court without leave of Court. And  
24 further disputes about sealing after this clarification by the  
25 Court will be resolved by counsel; and, if not, the Court is

1 likely to impose costs on the loser. I want to make it even  
2 more clear, if I can, that the second amended complaint, if any  
3 is filed, will be filed publicly and shall not replace any of  
4 the allegations against the defendants with the word  
5 "redacted." Instead, each count will stand on its own, and  
6 everything will be stated in the open with the sole exception  
7 of the specific details as I previously set forth. Only the  
8 nitty-gritty details of the scheme will be included in the  
9 sealed addendum. And if the Court determines that any  
02:54 10 inappropriate material appears in the addendum, it will not  
11 hesitate to order its unsealing to that extent.

12 The Court reiterates that the only reason it is  
13 allowing the addendum to be filed under seal is because it  
14 presumably will describe in detail how the defendants allegedly  
15 executed their scheme to defraud and could be copied by those  
16 wishing to perform a similar scheme resulting in future  
17 financial harm to the plaintiffs.

18 With respect to the pending motions, therefore, the  
19 defendants' motions to dismiss, Docket Nos. 18 and 41, are  
02:55 20 allowed. The plaintiff's motion to strike, Docket No. 53, is  
21 denied. And with respect to the motions to seal, that is,  
22 Docket Nos. 24 and 45, they are denied as moot because the  
23 documents with sensitive material will be returned to counsel  
24 by the Court, and we're going to start over again in an effort  
25 to avoid any future problems.

1           Now, do counsel have any questions with regard to the  
2 Court's rulings? Miss Durham?

3           MS. DURHAM: Your Honor, I don't have any questions.

4           THE COURT: With respect to the defendants, Mr.  
5 Lichtblau?

6           MR. LICHTBLAU: No, your Honor.

7           THE COURT: And Mr. Heyman?

8           MR. HEYMAN: No, your Honor.

9           THE COURT: All right. Is there anything else that  
02:56 10 the Court can do now that will help get this matter back on  
11 track?

12           Well, okay. Then, in conclusion -- do plaintiffs have  
13 something to offer?

14           MR. IVERSON: I just had a question. There are some  
15 pending tracking order deadlines. I just wanted to -- my  
16 understanding would be that those tracking order deadlines  
17 would have to change given the fact that we're going to have to  
18 put in a new complaint now.

19           THE COURT: What are the dates? I don't have them in  
02:57 20 mind. Do you have them with you?

21           MR. IVERSON: I do not have them on the top of my  
22 head, although they were on the docket.

23           THE COURT: This was the scheduling order we entered  
24 last time?

25           MR. IVERSON: The scheduling order, exactly. I



1 believe they start coming up at the end of January. I think  
2 automatic discovery starts becoming due.

3 THE COURT: We're going to have to amend those dates,  
4 presumably, by 30 days. Each one of the deadlines will be  
5 extended by 30 days unless there's some reason why I shouldn't  
6 do that.

7 And I don't have it in mind, but it seems to me that  
8 since I'm now pushing back the commencement of the details of  
9 this case, why it shouldn't be delayed. Does anybody know of  
02:58 10 any reason why I ought not to delay those deadlines by 30 days?

11 MR. HEYMAN: No, your Honor.

12 THE COURT: All right. Then I will do that. I'll ask  
13 the deputy to reissue the document. But for your own planning  
14 purposes, you can assume that the scheduling order will be  
15 amended by the extension of every deadline in that scheduling  
16 order by a matter of 30 days, one month.

17 MR. IVERSON: Thank you, your Honor.

18 MR. HEYMAN: Your Honor, could I ask one question?

19 THE COURT: Yes.

02:58 20 MR. HEYMAN: Presumably, we'll have the opportunity to  
21 just -- if we still believe they don't state a claim, to move  
22 to dismiss then? I don't know if 30 days is -- if you want to  
23 maybe hold off on setting the new deadlines until we see how  
24 that briefing -- or, I guess, we can just amend them later.

25 THE COURT: What was the first -- here we are the

1 middle -- call it in the end of December, and the new complaint  
2 will be filed no later than -- and I take it you can do it  
3 sooner, Miss Durham. It would help. It's going to be no later  
4 than the 21st of January.

5 Then if the defendants feel it appropriate to file a  
6 motion to dismiss, they may do so. But I am at least now,  
7 without these deadlines in front of me, reluctant to delay them  
8 any further. If you're going -- everybody knows what the  
9 issues are now. We're not going to have a preemption issue  
02:59 10 next time around. You may be challenging the -- whether or not  
11 claims have been stated with respect to the counts that will be  
12 in the amended -- in the second amended complaint. But I think  
13 we'll be in a position to respond much more quickly than we  
14 have the first time around.

15 MR. HEYMAN: I'm not saying I plan to do this, your  
16 Honor, but I have considered the possibility of seeking --  
17 given there is absolutely no case law with an airline under  
18 these exact circumstances, suing a passenger, of seeking  
19 interlocutory review. And I think that I'd have to actually  
03:00 20 make the preemption argument to preserve it for that purpose.

21 THE COURT: You have to do what you have to do to  
22 preserve it. But I can tell you now, I've considered that, and  
23 my judgment is not going to change with respect to the  
24 preemption argument.

25 MR. HEYMAN: I understand.

1 THE COURT: Fair enough.

2 MR. HEYMAN: Thank you.

3 THE COURT: I just -- what I want to try to convey to  
4 counsel is the idea that you are going to have to work with one  
5 another. I agree with the defendants in their assumption that  
6 filing matters under seal is not to be desired. I don't, as an  
7 ordinary course, seal pleadings that are filed in cases. And  
8 I'm doing so in this case in a limited way, to try to preserve  
9 for the plaintiff the possibility of avoiding copycat conduct  
03:01 10 by others who would allegedly attempt to defraud the airline.

11 Fraud hasn't been proven yet. It hasn't even been  
12 appropriately alleged yet. And it may be that the second time  
13 around I will determine that a claim has not been stated. But  
14 as I see it, a claim is possibly stated if I get the kind of  
15 detail that I need.

16 But I don't want this to be a matter where, every time  
17 we go forward with a potential dispute, there is a problem with  
18 respect to the alleged allegations of the fraudulent conduct.  
19 I think the plaintiffs -- hopefully, I've conveyed to them what  
03:02 20 my concern is about the pleadings and about the reluctance to  
21 have these battles about sealing and motions to strike and all  
22 of this which does not go to the merits of the claim that the  
23 airline is trying to make.

24 So, hopefully, this will clarify matters, and counsel  
25 will be able to work together. You are officers of this court.

1 You are compelled to try to work out these matters in ways that  
2 preserve the rights of both sides. And I commend it to you  
3 both and forewarn you that if I feel that one or the other side  
4 is not making a good-faith effort to do that that I will impose  
5 costs and/or sanctions against the party that I believe is  
6 obfuscating. Okay.

7 Yes, Mr. Lichtblau.

8 MR. LICHTBLAU: Your Honor, you mentioned earlier this  
9 documents would be returned, and I was wondering, actually,  
03:03 10 which documents.

11 THE COURT: Well, whatever documents that are in issue  
12 that parties believe have sensitive information in it that are  
13 currently at issue on these motions to seal. I don't want to  
14 have a permanently sealed document in this case. Since we now  
15 have no complaint before us, we shouldn't have any sealed  
16 documents. We shouldn't have the necessity of sealed documents  
17 before us.

18 So if there is allegedly sensitive information in  
19 documents that have been filed to date, they should be returned  
03:03 20 to counsel, and then they won't be on file, and there won't be  
21 any problem about their being sealed.

22 MR. LICHTBLAU: I think that, your Honor -- in other  
23 words, the -- for example, all of the pleadings involving the  
24 motion to dismiss on preemption, I think those were all sealed.  
25 Pretty much all of them were sealed. The Court is saying that

1 those would all be returned and there will be nothing on record  
2 concerning those documents?

3 THE COURT: The only thing I want to be concerned  
4 about is the allegedly sensitive information that United Air  
5 Lines believes constitutes the fraudulent conduct. I haven't  
6 gone through the docket to itemize exactly which documents  
7 ought and ought not to be somehow eliminated from the docket so  
8 that they will not be a permanently sealed document on this  
9 court's docket.

03:05 10 Now, if it takes counsel to sit down and make a  
11 proposal as to which documents that entails, then that's what I  
12 will do. I want you to determine for me how this docket is to  
13 be cleaned up, that is, resolved of any sealed documents so  
14 that we can go forward with a clean case. And the only thing  
15 that's going to be sealed from this point forward is the  
16 details of the alleged fraud that will be listed as an addendum  
17 to the second amended complaint.

18 MR. HEYMAN: So if I understand correctly, your Honor,  
19 for example, in my memorandum in support of the motion to  
03:05 20 dismiss, which the plaintiff has maintained should be filed  
21 under seal and, obviously, we've taken the position that  
22 there's nothing there that should be sealed, obviously, some of  
23 that falls within your Honor's instructions now and some of it  
24 doesn't. Are you suggesting that we would be taking back any  
25 document that has any portion of information in it that you

1 would like to see sealed in future pleadings?

2 THE COURT: Well, I don't have the documents in front  
3 of me now, Mr. Heyman, and I can't tell you that Docket Nos.  
4 27, 42, and 87 are to be returned to counsel because they have  
5 sensitive information in it.

6 I need to have -- if you can't resolve this yourself  
7 -- and I'll give you 48 hours to do that, by the end of  
8 business, say -- by noon on Wednesday, to resolve it amongst  
9 yourselves. If you can't, then you tell me what it is that you  
03:06 10 believe I should leave on the docket and what I shouldn't based  
11 upon my rulings that I don't want to have permanently sealed  
12 documents in this case.

13 MR. HEYMAN: I apologize, your Honor. I should have  
14 probably made this more clear. If a document contains any  
15 portion of information that you believe sealing is appropriate  
16 to, should the entire document come back to us? Or are you  
17 asking -- you don't want any more redactions. For example, you  
18 don't want us to replace those with redacted documents.

19 THE COURT: Absolutely not.

03:07 20 MR. HEYMAN: If it has any portion at all of sealed  
21 information, you want the document returned?

22 THE COURT: To the extent that it is allegedly  
23 sensitive information, I want it off the docket of this court  
24 and not to be permanently sealed with the papers of this case.  
25 That's what I'm trying to avoid --

1 MR. HEYMAN: Right.

2 THE COURT: -- a permanent sealing of documents. I  
3 mean, as we go forward, as I anticipate, this second amended  
4 complaint is going to include an addendum that will be sealed.  
5 That's going to be the only document that's going to be sealed  
6 as the case goes forward.

7 MR. LICHTBLAU: I think, your Honor -- I think perhaps  
8 the concern is that we have made an argument -- the defendants  
9 have made an argument that United has taken different positions  
03:08 10 in this case than it's taken in other cases. There are, as we  
11 understand it today, third parties who might have an interest  
12 in the documents that have been filed to date in revealing that  
13 United has taken contrary positions in this case than it's  
14 taken in other cases.

15 So by returning -- if any of those documents are  
16 returned or taken off the docket, those third parties would  
17 lose that opportunity if I'm making myself clear.

18 THE COURT: Well, I understand that a third party has  
19 filed a document in this session. I haven't looked at it, but  
03:08 20 it was just filed, and it does have to do with what you  
21 suggest. But that seems to me to be an argument for another  
22 day. In fact, it's another party, a third party. You don't  
23 represent that party, do you? So I don't have a party before  
24 me now that is making that argument.

25 And, of course, I will have to deal with that at some

1 stage. I'll wait until it's responded to, presumably by the  
2 plaintiffs, and then I'll try to resolve that. But maybe it's  
3 because I don't have in mind precisely what documents it is  
4 that are under dispute being argued about as being sealed or  
5 not sealed at this point. But my overall focus is getting  
6 sealed documents off the docket.

7 MR. LICHTBLAU: May I suggest, your Honor, that the 48  
8 hours to -- for counsel to work this out may be complicated by  
9 what was filed today. And perhaps what was filed today --  
03:09 10 perhaps that party ought to have -- perhaps United ought to  
11 have a chance to respond to that party, et cetera, before we  
12 get into a discussion of what should be taken back off the  
13 docket because my understanding of what was filed today is that  
14 that party is seeking to look at some of the documents which  
15 were sealed. I don't know how we would have a discussion about  
16 what should be taken off the record if there's a third party  
17 that wants to look at the very same document. I don't know  
18 what we could conclude by Wednesday at noon.

19 THE COURT: Anything further, Miss Durham?

03:10 20 MS. DURHAM: Your Honor, I think that maybe if counsel  
21 sit down and talk about what's actually in the pleadings, we  
22 can decide where to go from here. As you, your Honor, it's  
23 hard to make the call not having the pleadings in front of me.  
24 I know that, for example, in our case, we made some motions to  
25 seal in advance of having to file ours. We didn't know exactly



1 what we would have to say, but we anticipated having to say  
2 certain things.

3 I think we can go back, look at what is actually in  
4 the briefs, and decide -- perhaps there's something that's  
5 sealed that doesn't need to be sealed, whether it remain in the  
6 docket or not. I don't necessarily want to make this decision  
7 in a vacuum.

8 THE COURT: Obviously, to the extent that counsel can  
9 agree that documents don't need to be sealed, that resolves the  
03:11 10 problem. I'm not in the business of trying to second-guess  
11 what ought and ought not to be sealed. Only counsel can advise  
12 the Court in that regard.

13 But I'm not going to wait on this decision depending  
14 on what a third party has filed with me. I have enough  
15 problems with the disputes that the two of you have with one  
16 another rather than worrying about what some third party's  
17 worries are.

18 So I am going to instruct you to -- you can remain  
19 here because there's nobody else in this courtroom after now --  
03:11 20 to try to resolve it to the extent that you can. That you  
21 can't, let me know within 48 hours. If you can't resolve it  
22 within 48 hours, then I will resolve it myself. But I -- in  
23 light of what I've said before, I sincerely hope that you can  
24 come to some sort of resolution and give the Court guidance as  
25 to what should and should not be remaining on the docket

1 understanding what I've done to the amended complaint; namely,  
2 I've dismissed it.

3 Okay. Anything else? If not, we're adjourned.  
4 (Whereupon, at 3:12 p.m. the hearing concluded.)

5  
6 \* \* \* \* \*

7  
8 C E R T I F I C A T E

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10  
11 I certify that the foregoing is a correct transcript  
12 of the record of proceedings in the above-entitled matter to  
13 the best of my skill and ability.

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19 /s/Cheryl Dahlstrom

12/22/2009

20 Cheryl Dahlstrom, RMR, CRR  
21 Official Court Reporter

Dated

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